115 Ap 285

115 I.A. 2nd 285

53437

WALTER ERIKSON,	)	
	)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
SAMUEL WOODALL and VEARLA M. WOODALL,	)	Hon. Martin G. Luken, Presiding.
	)	
Defendants-Appellees.	)	

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The plaintiff, Walter C. Erikson, appeals from a judgment order sustaining the motion of the defendants, Samuel Woodall and Vearla M. Woodall, for summary judgment and dismissing his complaint.

The verified complaint alleged the breach of a fully performed and written real estate contract in that a sewer and water were not at the property as the defendant sellers had expressly represented in the contract. The complaint prayed for damages in the amount of five thousand dollars. After the defendants had filed their verified answer and the plaintiff had filed his reply, the case went to trial on the basis of a stipulation of facts entered into by opposing counsel. Thereafter the court entered its judgment order finding no liability on the part of the defendants and dismissing the complaint.

In this appeal, the plaintiff contends that the words "sewer and water at the property" appearing in a written real estate contract represent that there are operational sewer and water facilities on the premises.

The plaintiff-appellant has filed his brief, abstract, and record and has complied with all statutory requirements and rules of this court. No attorney has filed his appearance for the defendants nor have they appeared pro se in this court. As a result, no brief has been filed in this court by the defendants.

When the appellant has perfected his appeal but the appellee does not submit an answering brief, the reviewing court may reverse the judgment without further explanation of the merits of the appeal. People ex rel. Food Empire v. City of Chicago, 102 Ill. App. 2d 87, 243 N.E. 2d 622 (1968); Ogradney v. Richard J. Daley, Mayor, 60 Ill. App. 2d 82, 208 N.E. 2d 323 (1965); C.I.T. Corp. v. Blackwell, 281 Ill. App. 504 (1935).

Pursuant to the foregoing rule, the instant judgment is reversed; judgment is entered for the plaintiff and against the defendants on the issue of liability only; and the cause is remanded with directions that a further trial be held in which the plaintiff is to prove the amount of his damages.

JUDGMENT REVERSED & CAUSE
REMANDED WITH DIRECTIONS.

BURKE, J., and MC CORMICK, J., concur.

The appellant's brief is silent as to appellee's argument that the counterclaim presents matters not germane to the purpose of the mandamus proceeding. Section 2 of the Mandamus Act provides in part: "No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise." (Chapter 87, Sec. 2, Ill. Rev. Stat. 1967) The purpose of the petition for mandamus in the matter before us was to enforce the petitioner's right to examine the corporate books and records of the Briskin Manufacturing Company. The relief sought by the counterclaim was for money damages and has no relation to petitioner's right of examination. It is not germane to that purpose and was properly dismissed.

Having affirmed the order of the trial court it will be unnecessary to consider the third part of the appellee's brief in which it is alleged that appellant's brief violates rules of the Supreme Court and is replete with misstatements of fact.

The order sustaining petitioner's amended motion to strike and dismiss the defendants' counterclaim is affirmed.

AFFIRMED.

MURPHY, J., and BURMAN, J., concur.

115 I.A.2nd - 307

No. 52796

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
VIVIAN JORDAN, Defendant-Appellant.	)	HON. JOSEPH M. WOSIK PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a trial without a jury defendant was found guilty of theft of property valued in excess of $150. She applied for and was granted probation for a three year period upon condition that she make restitution in the sum of $1000, payable in minimum monthly installments of $35. On appeal defendant contends that the State failed to prove one of the material allegations of the indictment and that she was not proved guilty beyond a reasonable doubt.

Mrs. Iva Stout, the alleged victim of the theft, owned a three story apartment building at 7942 South Langley Avenue in Chicago. In June 1966 defendant resided in the building as a tenant. Just prior to that time, while Mrs. Stout was a patient in Michael Reese Hospital, she and the defendant made an agreement whereby defendant was to care for Mrs. Stout upon her release from the hospital, for which Mrs. Stout was to pay defendant $200 a month. Mrs. Stout testified that sometime in June she was released from the hospital and moved to the third floor apartment occupied by defendant. She brought with her all her clothing, bedroom furniture, cooking utensils, dishes, linens, rings, watches and a television set. In September 1966 Mrs. Stout again went to the

hospital and left the personal property in question in the defendant's apartment. She left the hospital the latter part of September and went to the Mark Howard Nursing Home, where she stayed approximately five months. She then went back to reside in the building at 7942 Langley Avenue in an apartment other than the one in which she had lived with the defendant. Her mother Mrs. Emma McClure later testified that during the period Mrs. Stout was in the nursing home she (Mrs. McClure) saw defendant removing her daughter's personal goods from the apartment. Mrs. Stout testified that none of her property was ever recovered and that its value was far in excess of $150.

Mrs. McClure was also a tenant in the building owned by her daughter. She occupied the second floor apartment, just below defendant's apartment. She testified that on October 1, 1966 (while Mrs. Stout was in the nursing home) she heard noises coming from the third floor apartment. She opened her front door and saw several expressmen and the defendant carrying various items down from the upstairs apartment. She saw defendant return to the apartment and carry out several more articles. The expressmen made a total of three or four trips carrying furniture out of the apartment. On October 3, 1966 Mrs. McClure entered defendant's apartment and found nothing there except a barrel with two coats pushed down inside it.

Defendant testified that in June 1966 she and her two sons and another woman lived on the third floor of the building owned by Mrs. Stout; that on June 4, 1966 Mrs. Stout moved into defendant's apartment pursuant to an agreement they had made, but that Mrs. Stout did not bring any furniture to

the apartment. On cross-examination however defendant admitted that a television set owned by Mrs. Stout had been in the apartment. She denied taking any of Mrs. Stout's property. The only other witness called by the defense was defendant's sister Marian Butler. She testified that on September 29 or 30th she helped defendant move out of the apartment and into another one about a block away. Her testimony was in substantial agreement with defendant's, save for one notable exception. Mrs. Butler testified that they began to move defendant's property out of the apartment late in the evening and finished the next day, whereas the defendant testified that she moved in the early afternoon.

At the conclusion of the testimony both sides waived final argument and the court found defendant guilty. A hearing in aggravation and mitigation followed and defendant was granted probation as before stated.

Defendant contends that no evidence was introduced to prove that several of the items of personal property enumerated in the indictment were stolen. The indictment charged defendant with the theft of the following property: "[B]edroom suite, silver place setting, television, mink cape, fox stole, set of furs, ring, five diamond stones and two rings, and one lot of household furnishings...." Mrs. Stout testified that she brought all her clothing, bedroom furniture, cooking utensils, dishes, rings, watches and a television set to defendant's apartment and that she had recovered none of those items. She testified that the value of the missing property was far in excess of $150. A person commits theft when he knowingly obtains or exerts unauthorized control over property of the owner and intends to deprive the owner permanently

of the use or benefit of the property. Ill. Rev. Stat., ch. 38, §16-1 (1965). "Property" is defined in the Criminal Code as "anything of value" regardless of the amount thereof. Ill. Rev. Stat., ch. 38, §15-1 (1965). The only items set out in the indictment and not included in the evidence of goods taken are the five diamond stones and the silver place setting. That omission does not affect the validity of the judgment.

When the elements of the crime of theft are established beyond a reasonable doubt as to any one of the items of "property" listed in the indictment, a conviction for theft is warranted. The testimony submitted by the State as it relates to any one of the items of "property" listed in the indictment was sufficient to support defendant's conviction. Where an indictment charges all the elements essential to the crime of theft, other matters unnecessarily added may be rejected as surplusage. People v. Figgers, 23 Ill. 2d 516, 179 N.E. 2d 626. The State's purpose in listing more than one item of personal property is to support its allegation that the value of the property was in excess of $150. Value however is only relevant to the determination of punishment and defendant makes no point as to this. People v. Brouilette, 92 Ill. App. 2d 168, 236 N.E. 2d 12; People v. Price, 81 Ill. App. 2d 111, 225 N.E.2d 453.

Defendant contends that the conflict between the testimony of the State's witnesses and that of the defense witnesses gives rise to a reasonable doubt of her guilt. Where the cause is tried without a jury, it is the function of the trial judge to determine the credibility of the witnesses and the weight to be afforded their testimony. Where the evidence

is merely conflicting, a reviewing court will not substitute its judgment for that of the trier of fact. People v. Clark, 30 Ill. 2d 216, 195 N.E.2d 631; People v. McCreary, 29 Ill. 2d 295, 194 N.E. 2d 233. Ample credible evidence was introduced to establish the defendant's guilt beyond a reasonable doubt and the judgment of the trial court is accordingly affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J. concur.

V 115 page 332

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ARTHUR IRVIN, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. RICHARD J. FITZGERALD, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of voluntary manslaughter and sentenced to a term of two to five years in the penitentiary. He maintains that the finding of voluntary manslaughter is not supported by the evidence and that the trial court committed error in refusing to allow certain testimony into evidence.

On the night of August 14, 1967 defendant was standing in front of his home at 57th Street and Wentworth Avenue in Chicago. An automobile driven by Melvin Ross, and carrying several members of a group called the "Condors," which included the deceased, John Gurley, stopped near the defendant and discharged its passengers. The group approached the defendant, and Ross asked the defendant why he did not come to the aid of another member of the Condors, Norris Washington, the night before when he was assaulted during a dice game. Defendant replied that the fight was none of his (defendant's) business, whereupon an argument ensued between defendant and Ross. Defendant then went into his home and returned with a stick, and the deceased went to the Ross automobile and returned with a baseball bat which he gave to Ross. The argument continued, but no blows were struck, and the defendant parted from the group.

The following day approximately twelve of the Condors group played baseball until late afternoon in a park located at the

corner of 57th Street and Shields Avenue. After the game they purchased beer and liquor which they consumed until approximately 9:00 P.M., at which time the defendant and several other men entered the park. The evidence is conflicting as to what transpired after defendant and his companions entered the park.

The People's evidence shows that defendant, who was armed with a gun, and his companions, some of whom were also armed, entered the park and approached the Condors without having been summoned. Defendant or one of his companions fired a shot into the ground, and defendant stated that he did not like the way the group "misused" him the night before and that he did not want to forget about the incident.

The People's evidence further reveals that defendant, with gun in hand, stated to Ross, "Don't you know I'll kill you, man!" and then slapped him. He then fired a shot at the feet of Washington, called him over and slapped him also. Finally, with the gun still in his hand, defendant called to the deceased, stating that the deceased was the person who armed Ross with the baseball bat the night before, and slapped his face. The deceased did nothing in retaliation, and when he turned to walk away, the defendant struck him in the head with the gun. The deceased thereupon turned and threw a partly full liquor bottle at defendant, striking him in the chest. Defendant staggered for a moment and then fired two shots, one of them hitting the deceased in the head and killing him.

Defendant's evidence relating to the events which occurred the evening of August 15th shows that he was visiting at a

relative's home earlier that day, which was located across the street from the park where the Condors were playing baseball. When the Condors observed defendant they called him into the park, and Washington continued the argument of the previous night. Defendant testified that he was carrying a gun in his pocket as a result of the confrontation the night before, but that the gun was in his pocket when he entered the park.

Defendant's evidence further reveals that one of the Condors told him that he could not live in the vicinity any longer, and that a fist fight then ensued between himself and Washington. When it appeared that defendant was overpowering his opponent, some of the Condors, with baseball bats in hand, approached defendant and began to push and crowd him.

Defendant thereupon removed the gun from his pocket and fired a shot into the ground in order to frighten the group off. He was then struck in the head with a bottle, fell to his hands and feet in a dazed condition and heard shots ring out. Defendant rose to his feet and left the scene. During his testimony, defendant emphasized that he fired only one shot during the incident, the shot fired into the ground in order to frighten the group, and that he fired no shots at the time the deceased was killed.

Defendant first maintains that the finding of guilty of voluntary manslaughter was erroneous, inasmuch as the evidence shows either that he was guilty of murder, or that he acted in self-defense in killing the deceased. It should be noted that the defendant testified at trial that he did not fire the shot which killed the deceased, but that he fired only one shot,

which he fired into the ground to frighten the group and which did not kill the deceased.

Where the record discloses evidence sufficient to sustain a conviction on a charge of murder and also on a charge of voluntary manslaughter, a finding of guilty on the lesser charge will not be disturbed unless palpably contrary to the evidence presented. People v. Green, 23 Ill. 2d 584, 590.

It is undisputed that the defendant had engaged in an argument with several of the Condors the night before the killing, and that during that argument both the defendant and Ross were armed with weapons. It is further undisputed that the argument was continued the following evening in the park, that blows were struck, and that defendant produced a gun. It is also undisputed that defendant was struck by a bottle thrown by the deceased during the melee, causing him to fall to the ground. Whether these circumstances provoked defendant to a sudden and intense passion, causing him to fire at the deceased after having been struck by the bottle was a question for the trier of fact to determine, which the trial court specifically found to have had occurred. See People v. Treger, 320 Ill. 329; People v. Millet, 60 Ill. App. 2d 22.

The cases cited by the defendant in support of his contention are governed by their peculiar circumstances, and for that reason they are not in point. See People v. Smith, 404 Ill. 350; Filippo v. The People, 224 Ill. 212; People v. Bush, 414 Ill. 441; People v. Martellaro, 281 Ill. 300; and People v. Spinks, 72 Ill. App. 2d 46.

Defendant's second contention is that he was not permitted to introduce evidence as to the violent nature and disposition

of the deceased and the Condors with whom the deceased was associated. We are in agreement with defendant's statement that evidence of the violent character of a deceased is admissible in a prosecution of an accused who relies on the defense of self-defense. People v. Adams, 25 Ill. 2d 568, 572.

The trial court allowed evidence from three witnesses, including the defendant, as to the nature of the group with which the deceased was associated. From the evidence it is clear that the trial court was aware of the propensities of the deceased and of the Condors as a group.

The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

53105

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. BOBBIE SATTERFIELD, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Francis T. Delaney, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Bobbie Satterfield was found guilty, following a bench trial, of the offense of burglary. Judgment was entered on the finding and he was sentenced to a term of not less than two, nor more than three years in the Illinois State Penitentiary. In this appeal the defendant contends that the trial court erred in entertaining an inference of guilt based upon his possession of certain stolen articles.

Major Humphrey, called as a witness for the State, testified as follows. His apartment was burglarized between the hours of 6:30 A.M. and 5:30 P.M. on October 10, 1967. On October 13, 1967, he was in the vicinity of Lake Street and Kedzie Avenue where he saw the defendant, who was wearing a sweater which appeared to the witness to be one which had been taken in the burglary. The witness' brother confronted the defendant and thereafter the defendant spoke to Humphrey, stated that he had purchased certain items of clothing from a man named Cave, including the sweater which he was wearing, and that he would return them to Humphrey. Humphrey stopped two police officers and told them that Satterfield was wearing a sweater which had been taken in a burglary. The police spoke to the defendant and then they, along with the defendant and Humphrey, at the suggestion of defendant, proceeded to the apartment of defendant's mother, where defendant surrendered two suits which had been taken in the burglary as well as the sweater which he had been wearing. A watch and ring also taken in the burglary were found in the inside coat pocket

of one of the suits. The witness then identified two suits and a sweater as items purchased by him, taken in the burglary, and recovered from the defendant. A radio, pair of shoes, sweater and jacket also taken in the burglary were not recovered.

On cross-examination Humphrey testified that it was his practice to double lock the door to his apartment, explaining that the door locks automatically when closed and then a separate lock is engaged with a key. Finally he testified that upon returning home from work on the day of the burglary he discovered that the second lock was not engaged and that the door did not appear to be damaged.

The testimony of Chicago Police Officer Adam Bilinski, called by the State, corroborated that of Humphrey with respect to what occurred on the street after his arrival and at the apartment of defendant's mother. Officer Bilinski also testified that he warned the defendant concerning his constitutional rights at the time of arrest, that being immediately prior to departing for the apartment in which the stolen items were recovered. Officer Bilinski further testified that he was present when the defendant was interrogated by detectives at the police station, during which time the defendant stated that if the police would give him until 6:00 P.M. and drop all charges against him, he would return the other items taken in the burglary which had not been recovered.

Detective William Conlin of the Chicago Police Department testified that he interrogated the defendant at the police station after warning him of his constitutional rights and that in the course of the interrogation the defendant offered to return the remainder of the property taken in the burglary if he were given until 6:00 P.M. to do so and if all charges against him were dropped.

Bobbie Satterfield took the stand on his own behalf

and testified as follows. He purchased two suits and the sweater which he had been wearing at the time of his arrest, as well as the watch found in one of the coats, from a man who he knew only by the name of Cave, on the evening prior to his arrest. The purchase was made on the sidewalk between Homan and Walnut Streets. The agreed price was sixty dollars, twenty of which was paid then with the remainder due the following evening. While he was free on bond pending trial he ascertained the name and address of the party from whom he purchased the clothing and watch, but never personally attempted to locate him. On one occasion he sent a friend to the address but Cave was not found there.

On cross-examination the defendant testified that he had not been employed for three or four months prior to his arrest; that he had given Cave twenty dollars in cash for the clothes and watch and that he was to pay an additional five dollars per day until the remainder of the purchase price was paid.

The defendant acknowledges that a conviction for burglary can be sustained upon circumstantial evidence consisting of proof of recent, exclusive, and unexplained possession of the fruits of a burglary. He argues, however, that his possession of the goods was not proven to be either recent or exclusive.

Whether possession of stolen property is recent is a question for the trier of fact to be determined by considering not only the time lapse between commission of the offense and proof of the defendant's possession, but also the nature of the goods, their salability and the ease with which they may be transported. People v. Pride, 16 Ill. 2d 82, 156 N.E. 2d 551 (1959). In view of these considerations we cannot say that the trial court's determination that defendant's possession of the stolen articles three days after the burglary was recent is erroneous.

The defendant next contends that the State failed to establish that his possession was exclusive since there was no

evidence of his possession from the time of the commission of the offense to the time of his arrest. Proof of exclusive possession does not require that defendant's possession be traced to the time of the commission of the offense. Such proof, if available, would show possession at the time of the commission of the offense and would constitute direct rather than circumstantial evidence of guilt and would also render meaningless the requirement that possession be shown to be recent.

Finally, the defendant contends that no inference of guilt can arise from the circumstantial evidence presented by the State since he offered an explanation of his possession of the articles stolen. This contention was answered in the case of People v. Hanson, 97 Ill. App. 2d 338, 240 N.E. 2d 226 (1968) where the court stated at page 342:

> When the courts speak of an explanation they do not mean that any explanation overcomes the inference of guilt. It must be a satisfactory explanation--one that the trier of fact finds reasonable and acceptable. . . . If no explanation is made the inference maintains and the weight to be given it is for the trier of fact to decide. If an explanation is made, the acceptance or rejection of the explanation is also for the trier of fact.

The trial court rejected defendant's explanation and the defendant has not shown, nor does the record indicate, any basis upon which that rejection could be deemed to constitute error.

The second point raised by the defendant in his brief was waived at the time of oral argument. Nevertheless, we have considered it and found it to be without merit. Accordingly, the judgment of conviction is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

115 I.A. 2nd 347

53835

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
CARLOS RODRIQUEZ, Defendant-Appellant.	)	HON. FRANCIS T. DELANEY, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was indicted for the offense of possession of a narcotic drug under Chapter 38, Section 22-3, Illinois Revised Statutes, 1967. A plea of not guilty was entered.

At the trial defendant changed his plea to that of guilty. It was stipulated that two police officers saw the defendant drop a brown paper bag containing marijuana and that his pocket contained more of the drug. Defendant was convicted and sentenced to the penitentiary.

The Public Defender, appointed counsel for defendant, has filed in this court, a petition for leave to withdraw as appellate counsel and pursuant to Anders vs. California, 386 U. S. 738, 87 S.Ct. 1396 (1967), has filed a brief in support of his petition which alleged the appeal was without merit.

The Court then notified defendant of the pending motion and petition and granted leave to file points in support of his appeal. Appellant did not respond.

The brief and argument state that the only grounds for appeal rest upon a failure to fully admonish defendant as to consequences of a change of plea to guilty. A review of the testimony at that time shows:

THE CLERK: Carlos Rodriquez.

MR. DILLNER: Your Honor, Carlos Rodriquez is

before the Court. After conferences with my client, Mr. Rodriquez, it is his wish at this time to withdraw a previously entered plea of not guilty to indictment number 68-485 and enter a plea of guilty to that indictment.

Is that correct, Mr. Rodriquez?

THE DEFENDANT: Yes.

THE COURT: What is the answer?

THE DEFENDANT: Yes.

MR. DILLNER: He said yes, Judge.

THE COURT: Mr. Rodriquez, you have heard Mr. Dillner, your attorney, advise me that you are changing your plea at this time from a plea of not guilty to possession of a narcotic drug to a plea of guilty of possession of a narcotic drug. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Do you know that when you plead guilty you waive your right to a trial either by means of the Court or by jury, twelve people in that box?

THE DEFENDANT: Yes.

THE COURT: Knowing that, do you still persist in your guilty plea?

THE DEFENDANT: Yes.

THE COURT: Before accepting your plea, it is my duty to advise you that on your plea of guilty to this charge of possession of a narcotic drug, for

the first conviction I may fine you not more than $5,000 and also may imprison you in the penitentiary for not less than two years and not more than ten years. Do you understand that, sir?

THE DEFENDANT: Yes, I do.

THE COURT: You can have both of them at the same time. And knowing all of that, do you still persist in your guilty plea?

THE DEFENDANT: Yes, your Honor.

THE COURT: Let the record show, therefore, that the defendant, Carlos Rodriquez, having been advised of the consequences of his plea of guilty to this indictment charging him with the offense of possession of a narcotic drug, and being so advised, he still persists in his guilty plea. The plea, therefore, will be accepted, and there will be a finding that Carlos Rodriquez knowingly and unlawfully possessed and had under his control a substance known commonly as marijuana, and there will be a judgment on said finding.

Defendant, thirty-six years old, appeared to understand the explanation given by the Court. Further examination of the record as required by Anders, supra, discloses no error in proceedings at the trial. The stipulated evidence and proper admonishments of the Court lead us to conclude that the appeal is frivolous and devoid of merit. Appellant's counsel is granted leave to withdraw. The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J. concur.

115 I.A.2d 402

No. 51999
32288

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
ROBERT MARTIN, Defendant-Appellant.	)	HON. EDWARD J. EGAN PRESIDING.

OPINION ON REHEARING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a trial without a jury defendant was found guilty of carrying a concealed weapon and was sentenced to serve a term of one to three years in the penitentiary. On appeal he contends that his conviction was based on evidence introduced in violation of his privilege against self-incrimination, that his attorney stipulated away his basic constitutional rights and that he was inadequately represented by his attorney. The facts follow.

Prior to his trial defendant made a motion to suppress as evidence the gun he had allegedly concealed. At the hearing on that motion Police Officer Cecil Young testified that on January 1, 1966 he investigated a disturbance at 6555 Cottage Grove Avenue, Chicago, and was told by those at the scene that defendant was the man who had caused the disturbance. He saw defendant walking away at a fast pace and ordered him to stop. Defendant continued to walk away and Young started after him. As defendant walked away Young observed him reach under his coat and discard a revolver. Young did not expressly testify that the weapon was concealed from view and since he was walking behind the defendant, it is doubtful that he was in a position to make such an obser-

vation. Young recovered the revolver and placed defendant under arrest. Defendant testified at the hearing that he had just purchased the revolver, that it was empty and that he did not know he was doing anything wrong in carrying it. He admitted that the gun was under his coat and that it was not visible.

The motion to suppress was denied and the court proceeded to try the case. The State's Attorney and counsel for defendant stipulated that the court could consider all the testimony given on the motion to suppress. The only additional evidence offered by the State was the revolver and a holster taken from defendant at the time of his arrest. Defendant moved for a finding of not guilty. The court denied the motion on the express ground that there was a "judicial confession" from defendant. By that he undoubtedly meant that taking into consideration the evidence heard on the motion to suppress, defendant had admitted guilt. Defendant then took the stand and testified that he did not intend to conceal the gun, that he made no attempt to conceal it, that he did not wrap his coat around himself in order to conceal it, and that he threw the gun away because he did not want any trouble.

Defendant contends that he was given inadequate representation by defense counsel. He was represented in the trial court by privately retained counsel. We have held that in such cases the judgment must be reversed and the cause remanded when the caliber of representation afforded the defendant is so inadequate as to deprive him of any chance of being found not guilty. People v. McCoy, 80 Ill.

No. 51999

App. 2d 257, 264, 225 N.E. 2d 123.

The only issue before the court in the instant case was whether defendant had been carrying the revolver in a way which concealed it from view. Defendant by his plea of not guilty clearly indicated that he did not wish to admit guilt. His attorney however agreed that the court could consider defendant's testimony given at the hearing on the motion to suppress. That testimony without further explanation was considered by the trial judge to amount to a "judicial confession." Under the holding in People v. Williams, 25 Ill. 2d 562, 185 N.E. 2d 686, it is clear that without the stipulation this testimony could not have been used against defendant on the issue of guilt. In Williams the court held that when a defendant testifies at a hearing on a motion to suppress, he waives the right against self-incrimination only with respect to the legality of the search and his testimony is limited to that issue. The stipulation in question deprived the defendant of any defense which might have been made on the issue of concealment.

Under these circumstances we must conclude that the defendant did not receive adequate representation and that he was deprived of a fair trial. The judgment is reversed and the cause is remanded with directions to grant a new trial and for such other and further proceedings as are consistent herewith.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Dempsey, P.J. and McNamara, J. concur.

115 I.A. 2nd 409

53507

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
ALVIN RIGGS, Defendant-Appellant.	)	COOK COUNTY. HON. L. SHELDON BROWN, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of murder and was sentenced to a term of 25 to 50 years in the penitentiary. He appeals.

On January 12, 1968, shortly before 11:00 P.M., the deceased, Eddie Gooden, was beaten unconscious by three men near the mouth of an alley at 545 East 67th Street in Chicago. Gooden was taken to a hospital, where he remained in a coma until his death on January 26, 1968. It was stipulated at trial that the ultimate cause of death was bilateral bronchial pneumonia, with the underlying cause of death being a traumatic laceration of the brain.

Mrs. Veronica Strajan testified that she was returning home with her three children on the date in question and was passing the alley at 545 East 67th Street shortly before 11:00 P.M. when she noticed three men in the alley going through the pockets of a fourth man who was lying on the ground. When the three men had finished going through the fourth man's pockets, they began kicking him in the head. At this point Mrs. Strajan sought the help of Ervin Willis who was seated in his taxi cab a short distance away.

Ervin Willis testified that he went to the alley and observed three men, one of whom he identified as the defendant, "stomping" a fourth man who was lying on the ground approximately

30 feet into the alley. The witness testified that although a light snow was falling at the time, the area where the beating took place was well lighted by a large overhead city alley light. The witness stated he was able to observe the clothing and the physical features of the defendant very clearly. He also testified that he heard the defendant yelling in a high pitched voice as he was kicking the deceased.

Willis later identified the defendant from photographs shown to him by the police, and also identified the defendant at trial not only by means of his physical features but also by means of the defendant's voice. The witness also identified two photographs, later admitted into evidence, as accurately portraying the scene where the beating took place.

While the beating was in progress, Willis hailed a passing police car and reported the incident. The police officer testified that when he arrived at the scene, he found Gooden 20 to 30 feet into the alley, almost directly beneath a large alley light. He testified that Gooden was unconscious, that his head was swollen and that he was bleeding from the nose and mouth.

Jack Adams testified that he was the owner of a gasoline filling station near the alley where the beating occurred, and that on January 26, 1968, the date of Gooden's death, the defendant and several other persons, including a man named Donald Brown, were in the station. When defendant was informed of Gooden's death, he replied, "Man, I know they are going to pick me up now." He then stated to Brown, "Man, remember I saved you in County Jail. I was

barn boss," and Brown acknowledged the statement.

Defendant presented the defense of alibi. He testified that he worked at his place of employment about an hour on the morning of January 12th, but that he returned home early because of a toothache. After defendant returned home he drank wine and liquor with a friend and then went to the grocery store where he purchased food. He returned home at approximately 5:00 P.M. and began to prepare dinner for himself and his wife, who was still at work. He testified that the tooth again began to bother him and he went to his bedroom to lie down. He stated that he fell asleep, awoke at approximately 9:00 P.M. that evening, took some medication for the toothache and went back to sleep. He again awoke between 12:00 and 1:00 A.M. to find his wife in the bedroom reading a book. He then went back to sleep and slept until after 9:00 A.M. that morning.

Defendant's wife substantially corroborated the defendant's testimony. She also testified that she was positive that defendant was sleeping in his bed until at least 1:00 A.M. on January 13th because she read a book and watched television in the bedroom from 8:00 P.M. until 1:00 A.M. when she retired for the night.

Defendant's mother testified that defendant and his wife lived on the second floor of her building. She stated that defendant went to bed at approximately 5:30 P.M. on January 12th because he was suffering from a toothache, and that he did not leave his bedroom until 10:00 A.M. the following morning. She testified that after another son left for work about 10:00 P.M. on January 12th, she locked and chained the doors to the house, and that the doors could not be opened without removing the chains.

Donald Brown was called as a witness for the defense and testi-

fied that he was questioned by the police concerning the beating and that he told them that he had no idea of who attacked Mr. Gooden. On cross-examination, the witness was questioned with regard to a statement given to the police on January 29, 1968, which was reduced to writing and corrected and signed by him. The statement, which was later admitted into evidence, was to the effect that Brown observed the defendant kicking the deceased in the head at the scene of the beating on the night in question. When confronted with the statement on cross-examination, Brown stated that he had something to drink the day he gave the statement to the police and that he only vaguely remembered what he told them.

Defendant first maintains that he was not proved guilty beyond all reasonable doubt. His initial contention in this regard is that the identification of him given by Willis was faulty, inasmuch as the night was dark and snow was falling when Willis saw Gooden being beaten.

Willis' identification of the defendant was positive and clear, and his testimony in that regard was unshaken on cross-examination. Willis testified that he observed the defendant for a period of three to four minutes from a distance of ten yards while defendant was kicking the deceased in a well lighted portion of the alley. The witness identified the defendant from police photographs, identified him at a police line-up, and identified him at trial, not only from his physical characteristics but from his voice as well. The witness' testimony was corroborated by the photographs of the scene admitted into evidence, and by the testimony of the investigating police officer and the testimony of Mrs. Strajan. A conviction may stand upon the testimony of an eyewitness, where that testimony is positive and credible. People v. Walker, 100 Ill. App. 2d 282, 292.

The weight to be given to the defendant's alibi evidence was a matter for the determination by the trier of fact; that determination

will not be overturned unless unreasonable. People v. Setzke, 22 Ill. 2d 582, 586. There is no evidence that the trial judge "completely ignored" defendant's alibi, as he suggests. There exist a number of inconsistencies in the testimony given by the defendant, and his wife and his mother. The trial judge heard the testimony, observed the witnesses, and made his determination accordingly.

Finally, defendant argues that the People's evidence fails to show a connection between the beating of the deceased administered by the defendant and the death of the deceased. The coroner's report reveals that the deceased was brought to the hospital in a coma, that he never regained consciousness, that death was caused by bilateral bronchopneumonia, and that the pneumonia was caused by a traumatic laceration of the brain. There is sufficient evidence of a connection between the beating and the death of the deceased. See People v. Ramirez, 92 Ill. App. 2d 341, 351.

Defendant next maintains that his counsel at trial was incompetent, inasmuch as Donald Brown was called as a witness by the defense, whereas without Brown's testimony, a motion for a finding of not guilty would have been allowed after the People's case. First, such a motion was in fact made, and denied, at the close of the People's case and before Brown was called to the stand. Furthermore, defendant's theory of the case at trial was that the People had no evidence against him, and it is clear that the defense counsel sought to employ Brown's testimony to support this theory, as a matter of trial strategy.

Defendant next complains that the photographs of the alley where the beating occurred were improperly admitted into evidence for the reason that no proper foundation was laid for their admission

A review of the testimony of Ervin Willis shows this contention to be groundless. City of Rockford v. Russell, 9 Ill. App. 229.

Defendant further argues that the statement of Donald Brown should not have been admitted into evidence without a prior showing that Brown was not intoxicated at the time he made the statement. While Brown testified that he had something to drink prior to giving the statement to the police and that what he told them was vague in his mind at the time of trial, there is no evidence that the witness was intoxicated at the time he gave the statement. This was a matter of credibility for the trial court to determine. People v. Young, 65 Ill. App. 2d 185.

In his brief, defendant has raised in a general way the contention that his constitutional rights were not observed by the police officers who investigated the homicide. The record is devoid of any evidence upon which such a contention can be based.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JOHN HILDRETH, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Robert J. Collins, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, John Hildreth, was indicted for unlawful possession of a narcotic drug. He pleaded guilty and was sentenced to two to four years in the penitentiary.

The defendant was indigent and the Public Defender was appointed to represent him both in the trial court and on appeal. In this court, the Public Defender has filed a petition for leave to withdraw as appellate counsel on the ground that an appeal could not possibly be successful. Pursuant to Anders v. California, 386 U.S. 738 (1967), he has also filed a brief raising the one issue which he believes might conceivably support an appeal: that the trial court did not fully admonish the defendant as to the consequences of changing his plea from not guilty to guilty. This court notified the defendant of the motion to leave to withdraw and afforded him the opportunity to file any points he might choose to support his appeal. No response has been received.

From the issue raised by the Public Defender and our own examination of the record, we find nothing arguable on the merits and conclude that an appeal would be wholly frivolous.

At his arraignment the defendant pleaded not guilty to the charge. He subsequently withdrew this plea and pleaded guilty. The Public Defender's brief covers the possible issue of whether the trial court properly accepted the defendant's plea of guilty.

A plea may be accepted in open court when the court finds that the defendant understands the nature of the charges against him and the consequences of his plea, and, understanding this, pleads guilty. Ill. Rev. Stat. (1967) ch. 110A, §401(b). The defendant had the assistance of the Public Defender when he entered his plea of guilty. This counsel stated in open court that he and the accused had discussed the possible results of a plea of guilty and the defendant had decided to plead guilty. The court asked the defendant if this was correct and, upon receiving an affirmative response, informed him of his right to a jury trial, the maximum sentence for the offense, and the consequences that could follow a guilty plea. The defendant persisted in his plea of guilty after this admonishment and the plea was accepted. The court fully and completely warned the defendant [People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E. 2d 312 (1962)], and the acceptance of the guilty plea of the accused, a man of thirty-nine, was proper.

The defendant's counsel is granted leave to withdraw and the judgment of conviction is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.